



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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JUL 22 2009

RE: MUR 6122
National Association of Home Builders

Dear Mr. Braden:

On January 23, 2009, the Federal Election Commission notified your client of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 15, 2009, the Commission found, on the basis of the information in the complaint, information provided by your client, and other available information, that there is no reason to believe the National Association of Homebuilders violated 2 U.S.C. § 441b(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Camilla Jackson Jones, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Shonkwiler".

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: National Association of Home Builders

MUR: 6122

**Gary Miller for Congress and Cathleen Miller,
in her official capacity as Treasurer**

I. INTRODUCTION

This matter involves allegations that the National Association of Home Builders ("NAHB") made a prohibited corporate expenditure, a prohibited PAC solicitation outside its restricted class, and/or a prohibited in-kind contribution to Gary Miller for Congress (the "Miller Campaign") in connection with a mailer it sent to homes in Congressman Miller's district a week prior to the 2008 general election. NAHB denies that the mailer was a PAC or campaign solicitation and denies that it contained the express advocacy required to constitute a corporate expenditure. Both NAHB and the Miller Campaign deny that the mailer was coordinated with the Miller Campaign in a manner that would result in an in-kind contribution.

Based on a thorough review of the Complaint, the Responses, and other available information, there appear to be no basis for finding that the NAHB mailer is a corporate expenditure or an in-kind corporate contribution. First, the NAHB mailer is not a solicitation as defined by the Federal Election Campaign Act of 1971, as amended ("the Act"). Second, the mailer does not qualify as a corporate expenditure because it does not contain express advocacy under the standards set forth in 11 C.F.R. § 100.22(a) & (b). Finally, there is no indication that the mailer qualifies as a coordinated communication as defined in the Act, since the mailer does not meet the third prong of the three-prong coordination test. See 11 C.F.R. § 109.21.

Accordingly, the Commission found no reason to believe that the National Association of Home Builders made a prohibited corporate expenditure or a corporate in-kind contribution, or

that Gary Miller for Congress and Cathleen Miller, in her official capacity as Treasurer, received a prohibited in-kind contribution in violation of 2 U.S.C. § 441b(a).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

NAHB, an incorporated building industry trade association whose stated mission is to "promote policies that will keep housing a national priority," sent a mailer to homes in Congressman Miller's district a week prior to the 2008 election praising his voting record on certain issues and suggesting that readers "thank" Congressman Miller for "fighting for working families in Southern California." Complaint, Attachment 1. The mailer contained the following statements:

- **Protecting the American Dream.**
 - Gary voted to create a \$7,500 temporary first-time home buyer tax credit.
 - Voted for legislation to make more mortgage bonds available.
 - He voted for legislation to help victims of the sub-prime crisis.
- **Energy Independence Is No Longer Just A (sic) Economic Issue, But Also A National Security Issue.**
 - Gary supports increased development of clean coal, natural gas, and oil.
 - Supports increasing domestic exploration in Alaska and off our coast.
 - Congressman Miller supports incentives to encourage further development and use of alternative fuels.

See Complaint, Attachment 1.

The Complaint alleged that the NAHB sent "campaign literature" to certain individuals. According to the complaint, this constituted "an impermissible solicitation outside [its] restricted class." *See* Complaint.

Attached to the Complaint is a letter written by Ms. Jenny Hall, addressed "To Whom It May Concern," and stating that she and her husband had received the NAHB mailer on October 28, 2008 and were "not members of, nor contributors to, the National Association of Homebuilders, or the National Association of Homebuilders' Political Action Committee (PAC)." See Complaint, Attachment 1.

Both NAHB and the Miller Campaign responded to the complaint. In addition to the specific allegation of solicitation outside NAHB's restricted class, respondents also addressed whether the mailer expressly advocated the election of Congressman Miller and whether the NAHB republished campaign material and coordinated that mailer with the Miller Campaign.

NAHB admits that it sent the mailer to the Halls, but rejects all allegations of impropriety. First, NAHB denies that the mailer was a solicitation as asserted in the Complaint, arguing that the mailer did not solicit funds from the recipient or provide information as to how the recipient might make a contribution. *Id.* Second, NAHB denies that the mailer constituted a corporate expenditure, because the communication was not express advocacy and states that it is merely an exercise of NAHB's right to publicly discuss issues relevant to the home-building industry. *Id.* at 2-3. Finally, NAHB avers that the mailer is not "campaign literature" and therefore not a coordinated communication because it does not meet the three-prong coordination test set forth in the Commission's regulations. *Id.*

NAHB submits an affidavit from its Staff Vice President of Government Affairs, Stephen T. Gallagher, who attests to the circumstances surrounding the creation, production, and distribution of the mailer. Affidavit of Stephen T. Gallagher ("Gallagher Aff.") at ¶ 1. Gallagher declares that the intended audience for the mailer, means of communication, media used, and timing of the mailer were decisions made solely by NAHB, and neither Congressman Miller, his

1 agents, campaign, nor any political party had any role in the creation, production, or content of
2 the mailer. *Id.* at ¶¶ 5-6. Gallagher attests that the mailer did not use any candidate's campaign
3 materials and was not created, produced, or distributed at the suggestion or request of any
4 candidate, authorized committee, or political party committee. *Id.* He also states that the mailer
5 was created without the use of any common vendors for its creation or distribution, and without
6 any agreements (formal or informal), or discussion (substantial or insubstantial) between NAHB
7 and Congressman Miller, his agents, or authorized committee, or with any other candidate, their
8 agents, authorized committee, or party committee. *Id.* at 7.

9 Attached to Gallagher's affidavit was a copy of an NAHB Issue Communications Pledge
10 ("Issue Pledge"), which was provided to and signed by all NAHB employees working on the
11 mailer. NAHB Response, Exh. B. The Issue Pledge states that NAHB adopted guidelines for
12 the conduct of any issue communications, which include:

- 13 • No discussion by any NAHB employees or officers regarding issue
14 communications will be made with any candidate.
- 15 • No candidate will be made aware of any NAHB issue communication plans.
- 16 • NAHB employees are specifically informed that any transmittal of any issue
17 communication plan to any candidate or political committee may be the grounds
18 for dismissal from NAHB employment.
- 19 • No NAHB official, member or employee who is involved in a federal candidate's
20 campaign...may participate in any discussion of or planning for any issue
21 communications in which that candidate or his or her opponent is to be identified.
- 22 • NAHB will not use for its issue communications any vendor that has worked with
23 the campaign of an identifiable candidate in such communications.
- 24 • I also pledge to recuse myself from any discussion of any NAHB issue
25 advertising that includes any federal candidate in whose campaign I am involved.
26 I pledge to inform NAHB of my involvement. If I am present at a meeting in
27 which such a discussion is contemplated, I will remove myself from that meeting
28 and refuse to take part in any decision making on such possible activities.

1 NAHB contends that the Gallagher Affidavit and Issue Pledge provide sufficient support for its
2 assertions that the mailer at issue was not a solicitation, coordinated communication, or corporate
3 contribution that violated the Act, and it asks that the Complaint be dismissed.

4 The Miller Campaign also submitted a response denying the allegations in the Complaint.
5 Specifically, the Miller Response clarified that the mailer, which was referred to in the
6 Complaint as a "campaign brochure," was actually produced and distributed by NAHB and not
7 the Miller Campaign. Miller Response at 1. The Miller Campaign denies any knowledge or
8 participation in the creation, production, or distribution of the mailer at issue, and states that
9 neither the Miller Campaign nor the candidate had any prior knowledge that the mailer was
10 being produced or distributed. *Id.*

11 **B. Analysis**

12 The Act prohibits corporations, such as NAHB, from making contributions or
13 expenditures in connection with any election for Federal office. 2 U.S.C. § 441b(a). The Act
14 and implementing regulations also prohibit corporate officials from facilitating the making of
15 contributions by ordering or directing subordinates or support staff to plan, organize, or carry out
16 a fundraising project as part of their work responsibilities using corporate resources, unless the
17 corporation receives advance payment for the fair market value of such services. 2 U.S.C.
18 § 441b(b); 11 C.F.R. § 114.2(f)(2).

19 **1. NAHB "Solicitation"**

20 The Complaint alleges that the NAHB mailer violated the Act by soliciting contributions
21 on Congressman Miller's behalf from individuals outside of NAHB's "restricted class."
22 Complaint at 1. A corporation and its officers may make partisan communications to its
23 restricted class of stockholders and executive or administrative personnel and their families, as

1 an exception to the Act's general prohibition against corporate facilitation of contributions. *See*
2 11 C.F.R. § 114.3. 2 U.S.C. § 441b(b)(2)(A). As long as these communications are aimed at
3 this "restricted class," and the corporation does not otherwise use corporate resources to facilitate
4 the contributions by means such as coercing employees to contribute, or by collecting and
5 forwarding the contributions, such communications are not a violation of the Act. *See* 11 C.F.R.
6 § 114.2(f)(1).

7 While the Complaint alleges the mailer sent by NAHB was "an impermissible
8 solicitation" that was "conducted outside their restricted class," the mailer does not ask for
9 contributions, nor does it provide any mechanism or means by which the recipient could make a
10 contribution. *See* NAHB Response at 2. There is no telephone number, street address or
11 campaign website provided that a recipient could use to make a contribution.¹

12 Based on the available information, the Commission found no reason to believe that the
13 National Association of Home Builders conducted an impermissible solicitation of individuals
14 outside its restricted class in violation of 2 U.S.C. § 441b(b)(2).

15 2. Express Advocacy

16 Commission regulations found at 11 C.F.R. § 100.22(a) provide that a communication
17 expressly advocates the election or defeat of a clearly identified candidate when it uses phrases
18 such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses
19 campaign slogans or individual words, "which in context can have no other reasonable meaning
20 than to urge the election or defeat of one or more clearly identified candidate(s)...." 11 C.F.R.
21 § 100.22(a); *see also* *Buckley v. Valeo*, 424 U.S. 1, at 44 n.52 (1976) ("*Buckley*"); *FEC v.*
22 *Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*") (urging readers to vote for

¹ The mailer includes Miller's Congressional website address (www.garymiller.house.gov), which does not allow for the receipt of candidate contributions

1 "pro-life" candidates, and providing information indicating a view as to which specific
2 candidates met this description.). The NAHB mailer does not on its face meet the first test for
3 express advocacy, as the mailer does not include phrases such as "vote for," "cast your ballot,"
4 "elect," "defeat," "support," or campaign slogans or individual words which in context could
5 have no other reasonable meaning than to urge the election or defeat of Congressman Miller.

6 Commission regulations found at 11 C.F.R. § 100.22(b) provide that a communication
7 contains express advocacy when the communication taken as a whole or with limited reference
8 to external events, "could only be interpreted by a reasonable person as containing advocacy of
9 the election or defeat of one or more clearly identified candidate(s) because" it contains an
10 "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning"
11 and "reasonable minds could not differ as to whether it encourages actions to elect or defeat one
12 or more clearly identified candidate(s) or encourages some other kind of action." See 11 C.F.R.
13 § 100.22(b).

14 The NAHB response specifically denies that the mailer contains express advocacy and is
15 therefore a prohibited corporate expenditure. The mailer clearly does not contain express
16 advocacy under Section 100.22(a) of the Commission's regulations. Nor, when taken as a whole
17 and with limited reference to external events, such as the proximity to the election, does the
18 mailer at issue contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive
19 of only one meaning" upon which reasonable minds could not differ as to whether it encourages
20 electoral or some other action. See 11 C.F.R. § 100.22(b). While the mailer describes Miller as
21 "fighting for working families" and asks recipients to "Thank" Miller for positions and votes he
22 had taken in the past (e.g., voting to create a \$7,500 temporary first-time home buyer tax credit,
23 voting to make more mortgage bonds available, and voting for legislation to help victims of the

1 subprime crisis). It does not explicitly praise Miller's character, qualifications, or
2 accomplishments in a context that has no other reasonable meaning than to encourage actions to
3 elect or defeat Miller. *See e.g.*, Express Advocacy; Independent Expenditures; Corporate and
4 Labor Organization Expenditures: Explanation and Justification, 60 Fed. Reg. 35292, 35295
5 (July 6, 1995).

6 While the mailer was sent immediately prior to the general election, the focus of the
7 communication is on issues and Miller's positions on those issues. Given the lack of any clear
8 directive other than to "Thank" Miller for his positions, and taking the communication as a
9 whole, one can reasonably view the mailer as praising Miller's positions and encouraging him to
10 maintain those positions in the future, and not as encouraging the reader to vote for or against
11 Miller in the upcoming election. *See* MUR 5854 (Lantern Project) (advertisements criticizing
12 Senator's votes on particular issues were not express advocacy because they could reasonably be
13 viewed as expressing the sponsoring organization's view on that issue); *See also* MUR
14 5779/5805 (City of Santa Clarita) (banners thanking a U.S. Representative for a specific piece of
15 legislation did not expressly advocate his election because they could be reasonably interpreted
16 as advocating passage of the legislation and thanking the legislator for sponsoring it).

17 We therefore conclude that the mailer does not qualify as express advocacy, as set forth
18 in 11 C.F.R. § 100.22(b), and is not an expenditure, as defined by 2 U.S.C. § 431(9)(A)(i).
19 Accordingly, the Commission found no reason to believe that National Association of Home
20 Builders violated 2 U.S.C. § 441b(a) by making a corporate expenditure.

21 3. Coordination Allegations

22 The Act provides that a payment for a communication that is made by any person "in
23 cooperation, consultation, or concert, with or at the request or suggestion of" a candidate

1 constitutes an in-kind contribution to that candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i), 11 C.F.R.
2 § 109.21(b)(1). If the mailer were a coordinated communication between NAHB and the Miller
3 Campaign, it would be an in-kind contribution prohibited by 2 U.S.C. § 441b.

4 The Commission's regulations provide a three-prong test to determine whether a
5 communication is coordinated.² All three prongs of the test must be satisfied to support a
6 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
7 Explanation and Justification for Regulations on Coordinated and Independent Expenditures,
8 68 Fed. Reg. 772 (Jan. 3, 2003).

9 The first prong of the Act's three-prong coordination test provides that the
10 communication must be paid for by a person other than the Federal candidate, the candidate's
11 authorized committee, or political party committee, or any agent of the foregoing. *See* 11 C.F.R.
12 § 109.21(a)(1). Here, the first prong of the coordination test is met because NAHB admits that it
13 paid for the direct-mail communication at issue. NAHB Response at 2.

14 The second prong of the coordination test requires that a communication must satisfy one
15 of the "content" standards in 11 C.F.R. § 109.21(c), which include, among other things, a public
16 communication that refers to a clearly identified House or Senate candidate and is publicly
17 distributed in the clearly identified candidate's jurisdiction 90 days or fewer before the
18 candidate's general, special or runoff election. 11 C.F.R. § 109.21(c)(4)(i). The NAHB direct-

² After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F. Supp. 2d 10, 70-71 (D.D.C. Sept. 12, 2007) (granting in part and denying part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

1 mail communication clearly identifies a House candidate, Gary Miller, and was distributed in the
2 candidate's jurisdiction approximately seven days prior to the general election. Thus, the NAHB
3 mailer also meets the second or "content" prong of the coordination test.

4 The third prong of the coordination test requires that the parties have engaged in conduct
5 that meets any of the six following standards: (1) the communication is created, produced, or
6 distributed at the request, suggestion, or assent of a candidate, his authorized committee, a
7 political party or an agent of any of the foregoing; (2) the candidate or authorized committee is
8 materially involved in decisions regarding the content, intended audience, means, or mode of
9 communication; (3) there is substantial discussion about the communication between the person
10 paying for the communication and the candidate, authorized committee, political party, or agent
11 of the campaign; (4) the person paying for the communication and the campaign share certain
12 types of common vendors who use or convey information about the candidate's plans, projects,
13 activities, or needs in the creation, production, or dissemination of the communication; (5) the
14 communication is paid for by a person or by the employer of a person who was an employee or
15 independent contractor of the candidate; and (6) the dissemination, distribution, or republication
16 of the campaign materials occurs under circumstances that reflect agreement or formal
17 collaboration between the candidate or his committee and other party. 11 C.F.R. § 109.21(d)(1)-
18 (6).

19 The mailer does not meet the "conduct" prong of the coordination test. As discussed
20 below, each element of the conduct prong is specifically addressed and rebutted by NAHB and
21 the Gallagher Affidavit. Because the NAHB mailer fails to meet the conduct prong, there was no
22 coordination that would result in an impermissible in-kind contribution. See 11 C.F.R. § 109.21.

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1 The affidavit of NAHB Staff Vice President of Government Affairs Stephen T. Gallagher
2 establishes that the NAHB mailer was created and produced solely at the direction of NAHB and
3 its employees, without any involvement from Congressman Miller or any other candidate, their
4 agents, or employees. Gallagher Aff. at ¶¶ 5-6; *see also* Miller Response at 1. The Miller
5 Campaign reiterates that neither the candidate, Committee, nor its agents had any knowledge that
6 NAHB was producing or distributing the mailer. *See* Miller Response at 1. Gallagher also
7 declares that no common vendors were used in the creation and/or distribution of the mailer and
8 that there was no formal or informal agreement between NAHB and Congressman Miller, and
9 their agents, or discussion, substantial or otherwise, regarding this mailer between NAHB and
10 any candidate, authorized committee, or party committee or their agents, prior to the production
11 and distribution of the mailer. *Id.* at ¶ 7.

12 The Issue Pledge that Gallagher and all NAHB employees working on the mailer were
13 required to sign explicitly provides that NAHB employees and officers are to have no
14 discussions with any candidate, campaign, or party official regarding its issue communications or
15 publications discussing any issue communication plans; no candidates or committees are to be
16 made aware of any NAHB issue communication plans; and transmittal of issue communication
17 plans to a candidate or political committee by NAHB employees is grounds for dismissal.
18 NAHB Response, Exh. B. The Issue Pledge also states that NAHB will not use any vendor for
19 its issue communications that has worked with the campaign of a candidate unidentified in its
20 communications. *Id.* The Issue Pledge also requires the employee to recuse from any discussion
21 of NAHB issue-advertising or decision-making activities that involve a federal candidate in
22 whose campaign the employee was involved, and to inform NAHB of such involvement in any
23 federal campaign. *Id.*

**MUR 6122 (National Assoc. of Home Builders)
Factual and Legal Analysis**

1 Based on the available information, the Commission found no reason to believe that the
2 National Association of Home Builders made a coordinated communication in violation of 2
3 U.S.C. § 441b. The Commission further found no reason to believe that Gary Miller for
4 Congress and Cathleen Miller, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441b (a)
5 and 434(b) by accepting and failing to report a prohibited in-kind contribution.

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